

**THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA AT KAMPALA  
(COMMERCIAL DIVISION)**

5 **CIVIL SUIT 53 OF 2011**

**BARCLAYS BANK OF UGANDA LTD ..... PLAINTIFF**

**VERSUS**

10

**HOWARD M. BAKOJJA ..... DEFENDANT**

**BEFORE LADY JUSTICE FLAVIA SENOGA ANGLIN**

15

**JUDGMENT**

**Brief Facts:**

20 The Plaintiff and Defendant entered into an agreement on whereby the Plaintiff loaned the Defendant Shs. 130,000,000/- with interest at the rate of 20% per annum. The loan was payable within 60 months in monthly installments of Ug. Shs. 3,444,205/-, and was secured by a third party mortgage of property comprised in Busiro Block 401 – 402, Plot 788, land at Kikusa and Mawanyi, registered in the names of Seruwu Richard Bakojja.

25 The Defendant made some payments for the first three months and thereafter defaulted on his loan installment payment.

30 The Plaintiff issued notice to the Defendant requiring him to pay the arrears but in vain. When the Plaintiff attempted to sell the mortgaged property, the sale was resisted by squatters on the land, hence this suit seeking to recover the owing sums of Ug. Shs. 127,299,887/- together with interest and costs.

In his defence, the Defendant denied defaulting in servicing the loan before the expiry of sixty months disputing the amount claimed and contending that the interest rate is harsh and

unconscionable and that the Plaintiff's statement of account is tatted with errors. He prayed for dismissal of the suit with costs.

5 The Plaintiff filed a reply to the written statement of defence challenging the Defendant's claim.

Witnesses for both parties filed witness statements and they were cross examined.

10 Both parties were directed to file written submissions. The Plaintiff complied with the timelines set by court but the Defendant failed to file any submissions.

The following issues were framed for determination:-

- 1) Whether there was breach of contract by the Defendant.
- 15 2) Whether the Plaintiff is entitled to recover the sums claimed in the plaint.
- 3) What remedies are available to the parties.

20 The issues will be dealt with in the order they were set out.

**Whether there was breach of contract by the Defendant.**

The evidence of PW<sub>1</sub> Angelina Namakula Ojwono confirmed by PW<sub>2</sub> Dande Philip is to the effect that by letter of offer dated 18.05.10, the Defendant was granted a loan facility of Shs. 25 130,000,000/- Exhibit PEXH<sub>1</sub>

The loan was repayable in monthly installments of Shs. 3,444,205/-. The Defendant secured the loan by mortgaging property comprised in Block 401-402 Plot 788 land at Kikusa and Mawanyi – Exhibit PEXH<sub>2</sub> and PEXH<sub>3</sub> respectively. When the Defendant defaulted on the 30 loan, the Plaintiff issued a demand letter requiring payment of the entire sum due – Exhibit PEXH<sub>4</sub>. By then, the loan due was Shs. 127,299,887/-. Though the Defendants made some payments, he defaulted from September 2010.

35 In his defence, the Defendant claims that following the valuation of the mortgaged land, the Plaintiff agreed to give the loan based on the fact that any outstanding sum could be

recovered from the security. And that, while he was servicing the loan before his account was blocked – that is on 13.05.10, 24.06.10 and 03.09.10.

The loan was recalled in September, 2010 and account was blocked which according to him amounted to breach of contract by the Plaintiff. Since the loan was recalled, the Defendant  
5 has not made any payment to the Plaintiff.

The Defendant acknowledges that the loan was recalled because he defaulted in paying the installments and that the Bank was entitled to recover the outstanding amount. And that although he received the demand to pay the full amount, he did not oblige.

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Decided cases have established that ***“a breach of contract occurs where that which is complained of is breach of duty arising out of the obligation undertaken under the contract.”*** – **Taruis vs. Moy, Dacies Smith, Vanderrell & Co. [1936] IKB 399 at 404.**

15 In the present case, the Defendant failed to pay the agreed monthly installments thereby defaulting on the loan three months after the loan was given to him. This was a clear breach of the contract with the Plaintiff.

While the Defendant argues that the Plaintiff recalled the loan without due notice, blocked  
20 and summarily closed the account, thereby breaching the contract as well, this argument cannot be sustained.

The contract provided for payment of each installment by the 24<sup>th</sup> of each month – See Exhibit PEXH<sub>1</sub> paragraph 3(d) Business loan terms and conditions which provided that ***“the time for payment of each monthly installment by the borrower shall be of the essence.”***  
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Where a contract provides for prompt payment of each installment as being of the essence, the effect of the clause is that ***“any failure to pay an installment promptly is breach of contract going to the heart of the contract giving the right to terminate the contract at law....”*** – See **Lombard North Central PLC vs. Butterworth[1987] RB 527.**  
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The Plaintiff was entitled to terminate the contract at law.

For all those reasons, the first issue is answered in the affirmative.

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The next issue for court to determine is **whether the Plaintiff is entitled to recover the sums claimed in the plaint.**

5 The evidence of PW<sub>1</sub> shows that at the time the suit was filed SHS. 127,299,887/- was due to the Plaintiff from the Defendant. However, the Defendant states that the Plaintiff's suit is frivolous and vexatious as it was hurriedly filed and that in any case that Plaintiff could have disposed of the security to recover the money due.

10 But the Plaintiff's evidence clearly indicates that when the Plaintiff's lawyers tried to sell the security, they could not do so because of third party interests (squatters on the land) – PW<sub>1</sub> and PW<sub>2</sub>.

15 This court finds that the Plaintiff is entitled to recover the entire amount due on the loan as per paragraphs 8(i) and (ii) of the Business loan terms and conditions – Exhibit PEXH<sub>1</sub>.

The principle established by decided cases is that ***“where there is a clause providing that in event of any breach of contract a long term loan would immediately become payable and that interest on the full loan would not only still be payable but payable at once to constitute a penalty as being payment stipulated as in torrorem or legal threat of the offending party”***. – See the case of **Oresundsvarvet Aktiebalag vs. Marcos Diamantis Lemos (The “Angelic Star”)** [1988] ILLoyds Rep. 122 (CA). Sir John Donaldson Mr.

25 And as pointed out by Counsel for the Plaintiff and rightly so, under S.62(1) of the Contracts Act ***“where a contract is breached, and a sum is named in the contract as the amount to be paid in case of a breach or where a contract contains any stipulation by way of penalty, the party who complains of the breach is entitled, whether or not initial damage or loss is proved to have been caused by the breach, to receive from the party who breaches the contract, reasonable compensation not exceeding the amount named or the penalty stipulated, as the case may be”***.

30 The argument of the Defendant that the suit is frivolous and vexatious as it was hurriedly filed is hereby rejected. The Defendant admits that he defaulted in repayment that the bank was entitled to ask for full payment of the outstanding amount and that he received the demand note to pay the entire loan but did not do so. [Neither is the argument that the Plaintiff ought to have recovered the loan by selling the mortgaged property since the  
35 Plaintiff failed to sell the land because of squatters he was entitled to bring this suit to recover the amount due.

It was emphasized by Lord Denning in the case of **Altica Sea Carriers Corporation vs. Ferrostoal Poseidon Bank Reederei GMBH** [1976] ILLOYDS Rep. 250 that *“the aim of the law is to ensure that an innocent party receives his full due and that no rule or equity can compel him to take a loss no matter how minute it may be”*. He stated that an *“innocent party should be adequately compensated. The only compensation for non-payment of a debt is payment of the debt. The innocent party in other words is entitled to that no loss end and is empowered to achieve it by an action for debt. The contract breaker cannot escape his contractual liability or limit his liability by repudiating it and insisting that such repudiation be accepted by the innocent party.”*

Refer also to S.61 (1) Contracts Act –*“a party who suffers breach of contract is entitled to compensation for the loss”*.

And as already indicated in this judgment *“the only compensation for non-payment of debt is payment of debt”*. And this court also agrees with the evidence of PW<sub>1</sub> that giving security does not discharge the borrower from the duty to repay the loan.

And according to the case of **China and South Sea Bank Ltd vs. Tansoon Gin** [1990] IAC 536 – Lord Templeman *“...a mortgagor is not obliged to take steps to realize his security. Where a creditor has concurrent remedies against a debtor, a security and surety it is a matter for him which are the pursues, if indeed he pursues ant at all”*.

It has also been observed that *“where one person lends money to another, he may be content to rely on the personal obligation of the borrower to repay the loan. If the borrower fails to repay the loan in accordance with the agreement between parties, the lender can sue the borrower to recover what is due, and provided that the borrower remains solvent and has assets at least in equal value to the amount of the loan. (and his other liabilities), this right to sue is sufficient protection for the lender....”*.

The Plaintiff is entitled to recover the outstanding loan from the Defendant.

#### **Remedies available to the Plaintiff.**

The Plaintiff seeks to recover the sum of Shs. 127,299,887/-, interest on the sum at the rate of 20% per annum and costs of the suit.

As already pointed out herein, the Plaintiff is entitled to recover the outstanding sum on the loan which at the time of filing the suit was Shs. 127,299,887/-.

- 5 **Interest:** The Plaintiff claims interest at the rate of 20% per annum which was the agreed interest rate on the loan amount.

However, the Defendant in his evidence claims that the interest rate is unconscionable.

- 10 But as pointed out by Counsel for the Plaintiff, S. 62 (2) of the Contracts Act provides that ***“the penalty stipulated under Subsection (1) may provide for an interest on the amount of compensation to be paid”***.

- 15 And under clause 2(a) of the offer letter to the Defendant, it was clearly stated that ***“the borrower will pay interest (as well after, as before any demand or judgment or bankruptcy of the borrower) on the loan in respect of each interest period at the rate per annum as specified in the terms”***. The terms of the loan specify interest at the rate of 20%.

- 20 Under S. 26 (2) of the Civil Procedure Act: (1) ***“where an agreement for the payment of interest is sought to be enforced, and the court is of the opinion that the rate to be paid is harsh and unconscionable, and ought not to be enforced....., the court may give judgment for the payment of interest at such a rate as it may think”***.

- 25 This court finds in the circumstances of this case that the agreed rate of interest at 20% per annum having been charged a commercial transaction is not harsh and unconscionable and the Plaintiff is entitled to its enforcement.

- 30 The Plaintiff is accordingly awarded interest at the rate of 20% per annum on the outstanding amount from the date of filing the suit until payment in full.

- 35 **Costs:** The Plaintiff seeks to recover costs of the suit. Under S.27 (2) of eth C.P.A- ***“...costs of any action, cause or matter shall follow the event unless court for good reason orders otherwise”***.

Court finds that the Plaintiff is entitled to costs of eth suit and there is no good cause to deny them. Costs of the suit are accordingly granted to the Plaintiff.

Judgment is entered for the Plaintiff for all the reasons set out in this judgment in the  
5 following terms:-

- 1) The Defendant to pay the Plaintiff the sum of Shs. 127,299,887/- as special damages.
- 2) Interest is awarded on the said amount at the rate of 20% per annum from the date of  
10 filing the suit until payment in full.
- 3) Costs of the suit are awarded to the Plaintiff.

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**FLAVIA SENOGA ANGLIN**

20 **JUDGE**

**01.02.16**